

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ARCANGELO CAPOZOLLO
d/b/a Dynamic Advertising

Case No. 97-13184 K

Debtor

BANK OF CASTILE

Plaintiff

-vs-

AP 97-1252 K

ARCANGELO CAPOZOLLO

Defendant

Counsel for the Plaintiff Bank has consistently expressed his disagreement with the Court's refusal to approve his client's request to withdraw the Complaint in exchange for money from the Debtor/Defendant. He has done so even now in advising the Court of his client's decision to drop the whole case.

Understanding counsel's need for a clear statement by the Court that his client will understand, and also to provide an appealable order, the Court here reduces to writing exactly what it said during the status conference in this matter.

The Bank here has alleged that the Debtor committed acts which, if proven, would not only be grounds to deny discharge as to all debts, but would also be bankruptcy crimes: to wit, false oath or account; concealment, destruction, alteration of business records; concealment

of assets; etc. These are asserted in a 11 U.S.C. § 727 cause of action.

The Bank also complains of acts which, if proven, would result in a judgment of non-dischargeability as to the Bank's claim only. These are asserted in 11 U.S.C. § 523 causes of action.

Where, as here, a creditor asserts a § 727 cause of action that properly "sounds" in § 727, that creditor acts as a fiduciary for the benefit of all creditors in the case. Other creditors defer to that creditor to "carry the ball" for all creditors' benefit.

Plaintiff's counsel argues that so long as no other creditor complains (after notice and an opportunity to intervene in the action), this Court should approve a monetary settlement of the § 523 cause in exchange for abandonment of the § 727 cause.

Nothing could be further from the truth. It has been the consistent view of this Court for at least the 30 years since the Hon. Beryl E. McGuire was appointed, that no monetary settlement is ever permitted of a properly-framed § 727 Complaint, because to approve of such a settlement would be to invite criminal conduct.

If a debtor can be proven to have committed wrongful acts, then to accept value in exchange for "dropping" the § 727 complaint is a criminal violation of 18 U.S.C. § 152(6), by the plaintiff. The plaintiff would be one who "knowingly and fraudulently . . . receives . . . money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in a case under Title 11."

If, on the other hand, a debtor did not commit wrongful acts, then to accuse him

without a reasonable basis in law and fact, in hopes of getting a money settlement, is not only a criminal “attempt” under that same statute, but is also the kind of “shakedown” that extortion or racketeering or other federal crimes are made of.

The possibility that other creditors might not complain about the settlement has no bearing whatsoever on the potential criminality of what leads up to an announcement of the “deal” to other creditors.

The Court is frankly puzzled by Bank’s counsel’s “disagreement” with the above. Getting “bought-off” by a dishonest debtor is a crime. Asserting a baseless claim of dishonesty to extort money is a crime.

The lesson is to sue under § 523 if that is what a plaintiff believes can be established. Do not throw in a baseless § 727 cause to entice a money settlement. And if the § 727 claim is not baseless, do not file it unless you are willing to see it through.¹

It is now

ORDERED, that the request to withdraw the Complaint in exchange for value from the debtor is DENIED.

If the Plaintiff intends to abandon the action, it shall so notify all parties in interest of what it asserted, why it wishes to abandon the causes, and shall certify that no value is being received in consideration therefor. A form of such a Notice is available from the Clerk.

¹If the Court is convinced that the Plaintiff cannot afford to see it through, the Court might permit dismissal that does not involve a quid pro quo being paid by the debtor.

SO ORDERED.

Dated: Buffalo, New York
April 9, 1999

/s/ Michael J. Kaplan

Michael J. Kaplan, U.S.B.J.